

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SEA CON, L.L.C., a Washington)	
limited liability company,)	No. 56093-0-I
)	
Appellant,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
KEVIN P. HANCHETT and LASHER)	
HOLZAPFEL SPERRY & EBBERSON,)	
P.L.L.C.,)	
)	
Respondents.)	FILED: July 3, 2006
)	

GROSSE, J. – To prove causation in a legal malpractice action the plaintiff needs to show that “the outcome of the underlying litigation would have been more favorable, but for the attorney’s negligence.”¹ Here, Sea Con, L.L.C. alleges that its attorney, Kevin P. Hanchett, negligently failed to preserve its claim in bankruptcy. Because Sea Con signed a priority agreement that subordinated the full \$6,550,000 loan amount to Washington First International Bank prior to Hanchett’s involvement in the case, Sea Con cannot show that any alleged act or omission of Hanchett caused Sea Con to lose priority over the amounts at issue. We affirm.

FACTS

Seagulf Group, L.L.C. (Seagulf) was owner and developer of a condominium project in Seattle. Seagulf obtained construction financing for the project through Washington First pursuant to a deed of trust. Seagulf hired Sea

¹ Aubin v. Barton, 123 Wn. App. 592, 608, 98 P.3d 126 (2004).

Con, L.L.C. as the general contractor on the project on June 15, 1999. Sea Con started work on the project on July 15, 1999. Seagulf did not get its construction loan from Washington First International Bank (Washington First) until August 12, 1999, at which time it obtained a loan in the amount of \$5,400,000. Because Sea Con began construction before Washington First issued the loan, Sea Con's lien was superior to Washington First's security interest.²

In order to induce Washington First to make advances under the construction loan, Sea Con subordinated its lien rights by signing a Priority Agreement in favor of Washington First. The Priority Agreement states:

WHEREAS SEAGULF GROUP LLC, a Washington limited liability company who are the owners of the following lands in KING County, Washington, to-wit

SEE "LEGAL DESCRIPTION" ATTACHED

propose to erect or have erected thereon certain improvements and for said purpose have executed, or will execute a mortgage or deed of trust (hereinafter called "mortgage") in favor of

WASHINGTON FIRST INTERNATIONAL BANK

to secure the payment of \$5,400,000.00

which mortgage was dated
and recorded in the records of King County, recording No.

² See RCW 60.04.061:

The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant.

AND WHEREAS, the mortgage company has applied to TRANSNATION TITLE INSURANCE COMPANY a corporation, or its agent, hereinafter called the "title company", for a policy of title insurance insuring the priority of the lien of said mortgage.

AND WHEREAS, the undersigned has been employed to furnish materials or perform labor incidental to said improvements for which the undersigned may have a statutory lien and whereas the undersigned is desirous [sic] of the said mortgage loan being consummated [sic].

NOW THEREFORE, in consideration of the premises and as an inducement to the mortgage company to complete the said mortgage loan and to issue the said policy of title insurance, respectively, the undersigned hereby agrees that the lien of the above mortgage shall be and at all times remain prior, paramount and superior to any statutory right of lien that the undersigned may now have or hereafter acquire, whether for materials furnished or labor performed or for both thereof incident to said improvements on said above described premises.

The Mortgage Company shall not be liable for any application of the proceeds of said mortgage loan other than to pay the same to the order of the owners of said described premises. The Mortgage Company shall have the right at any time within four (4) months after the completion of the said improvements to make or procure to be made a new mortgage loan in like sum, the proceeds thereof to be applied in satisfaction and discharge of said mortgage, or to increase the amount of the said loan in any amount, provided only the net balance of proceeds of such increased mortgage loan after payment of the usual commissions and expenses and after full payment and discharge of the said prior mortgage loan shall be applied by the Mortgage Company in payment or in partial payment of any bill for materials or labor incurred in the construction of the said improvements, and any such new mortgage shall have the same priority as the original mortgage herein referred to.

In June 2000, Seagulf and Washington First concluded that the original \$5,400,000 loan would be insufficient to complete the project. The parties thus

modified the deed of trust by increasing the loan amount to \$6,100,000. In February 2001, the parties again modified the deed of trust by increasing the loan amount to \$6,550,000.

Seagulf experienced financial trouble and could not pay its creditors. Sea Con and other subcontractors and suppliers filed liens against the project pursuant to chapter 60.40 RCW. Sea Con sued Seagulf in King County Superior Court to foreclose its lien and obtain judgment for amounts owed under Sea Con's construction contract with Seagulf. Sea Con was represented in this action by attorney Mark Clausen of Linville Clausen Linton and Holley, P.L.L.C. In May 2001, Sea Con retained Kevin P. Hanchett of Lasher Holzapfel Sperry & Ebberson, P.L.L.C. to advise Sea Con pertaining to bankruptcy issues that may arise.

Seagulf sought protection from its creditors in November 2001 by filing a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington. Hanchett and Clausen jointly represented Sea Con in the Seagulf bankruptcy proceedings. Clausen continued to represent Sea Con in the superior court action. Seagulf's First Amended Disclosure Statement and Plan of Reorganization (Plan) was circulated in May 2002. The Plan provided that the proceeds of the sale of all the condominium units would go first to Washington First until its construction loan was paid in full. Thereafter, payment would be made to Sea Con and the other creditors on their liens based on the lien's order of priority. A hearing to approve the Plan was set

for June 17, 2002.

On June 4, 2002, Clausen emailed Hanchett inquiring whether it was possible to argue that there was a limitation on the amount of debt Sea Con had agreed to subordinate to Washington First:

I was reviewing the litigation guarantee, and I noted two modifications of the construction deed of trust after SEA CON started work. These increased the loan amount from \$5.4 million to \$6.5 million.

Do you have any experience, off the top of your head, as to whether SEA CON has a claim that the subordination agreement applies only to the original deed of trust, and not to funds advanced pursuant to a modification? Or for that matter, whether Washington First is junior to SEA CON for some or all of the loan amount as a result of the modifications?

Regards, Mark Clausen

On June 10, 2002, Hanchett initiated a conference call between Sea Con and Clausen to discuss the Plan confirmation and the question of lien priority. The details of this conversation are in dispute; however, as a result of this conversation it was decided that Hanchett would insert language in the Confirmation Order that would preserve the priority issues so that they could be litigated in state court rather than bankruptcy court. The Order thus stated:

ORDERED that the Plan filed by Seagulf Group, a copy of which Plan is attached hereto, is hereby confirmed and approved, subject to the terms of this Order, and it is further

. . .

ORDERED that . . . [t]his order and plan shall not be determinative as to the priority of lien claims or of priority as among claimants of the various Classes

Washington First re-noted its motion to determine priority in the superior court action and set the hearing on June 26, 2002, nine days after entry of the Confirmation Order. On September 27, 2002, the superior court heard Washington First's and Sea Con's cross motions for summary judgment on the priority issue. The court declined to rule on the issue because of concerns that the confirmed Plan had already decided the issue. The superior court referred the parties to the bankruptcy court to address the issue.

The parties, with Sea Con represented by Mark Clausen, presented the issue to the bankruptcy court that ultimately ruled the language in the Confirmation Order was descriptive only and did not contravene the express terms of the Plan that provided for full payment to Washington First before payment to Sea Con. This decision was affirmed in an unpublished decision by the Ninth Circuit Court of Appeals.³

Sea Con filed this legal malpractice action against Kevin P. Hanchett claiming that Hanchett's alleged actions in representing Sea Con before the bankruptcy court caused Sea Con to lose its priority over Washington First and constituted a breach of fiduciary duty and professional negligence. Hanchett moved for summary judgment on the sole ground that Sea Con could not prove that it was harmed by any of Hanchett's alleged actions because pursuant to the terms of the deed of trust and priority agreement, Sea Con's claim of priority

³ Sea Con, L.L.C. v. Wash. First Int'l Bank (In re Seagulf Group, LLC), 124 Fed. Appx. 580 (9th Cir. 2005).

over Washington First would not succeed in any instance. The superior court agreed and dismissed Sea Con's case. Sea Con appeals.

ANALYSIS

This case turns on whether, as a matter of law, the priority agreement signed by general contractor Sea Con subordinated Sea Con's statutory lien rights under the full security interest amount of the project owner's mortgage lender, Washington First. If it did, Sea Con cannot show damages and its legal malpractice claim fails.

We interpret the priority agreement language to ascertain the intent of the parties.⁴ "[I]n doing so, we apply an objective manifestation test, looking to the objective acts or manifestations of the parties rather than the unexpressed subjective intent of any party."⁵ "Only if the determination of intent depends on the credibility of extrinsic evidence, or a choice among reasonable inferences to be drawn from extrinsic evidence, is it an issue for the trier of fact."⁶

Sea Con concedes that the priority agreement subordinates its security interest in the project up to \$5,400,000, the amount of the initial loan from Washington First. However, Sea Con contends that the additional loan amounts of \$1,150,000, granted pursuant to modifications to the deed of trust, are not subject to the priority agreement. Hanchett contends the priority agreement

⁴ State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn. App. 299, 311, 57 P.3d 300 (2002)(citing, Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990).

⁵ State Farm, 114 Wn. App. at 311(citing Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 699, 952 P.2d 590 (1998)).

⁶ State Farm, 114 Wn. App. at 311(citing Berg, 115 Wn.2d at 667-68).

subordinates Sea Con's security interest to Washington First up to the total amount of the modified deed of trust: \$6,550,000. We agree with Hanchett.

The priority agreement states the deed of trust implicated by the priority agreement is the "deed of trust (hereinafter called 'mortgage') in favor of WASHINGTON FIRST INTERNATIONAL BANK to secure the payment of \$5,400,000.00". The deed of trust states:

THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (1) PAYMENT OF THE INDEBTEDNESS AND (2) PERFORMANCE OF ANY AND ALL OBLIGATIONS OF GRANTOR UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST.

The terms of the deed of trust define the "Note" it is securing as "the Note dated August 12, 1999, in the original principal amount of \$5,400,000.00 from Grantor to Lender, together with all renewals, extensions, modifications, refinancings, and substitutions for the Note."⁷ Finally, the priority agreement states:

NOW THEREFORE, in consideration of the premises and as an inducement to the mortgage company to complete the said mortgage loan and to issue the said policy of title insurance, respectively, the undersigned hereby agrees that the lien of the above mortgage shall be and at all times remain prior, paramount and superior to any statutory right of lien that the undersigned may now have or hereafter acquire, whether for materials furnished or labor performed or for both thereof incident to said improvements on said above described premises.

The priority agreement defines the "mortgage" being subordinated as the deed of trust executed between Seagulf and its lender, Washington First.

⁷ (Emphasis added).

Reading the deed of trust and priority agreement together, the “mortgage loan” being subordinated by the priority agreement is the “indebtedness” and “obligations” under the “NOTE, THE RELATED DOCUMENTS, AND [THE] DEED OF TRUST.” And the “Note” is defined in the deed of trust as “the Note dated August 12, 1999, in the original principal amount of \$5,400,000.00 from Grantor to Lender, together with all renewals, extensions, modifications, refinancings, and substitutions for the Note.”⁸ Sea Con therefore subordinated its claim on the indebtedness on the Note, which by the terms of the deed of trust included all modifications. The modifications included the increased mortgage loan amounts at issue, bringing the total indebtedness under the Note, and thus the total amount subordinated by the priority agreement to \$6,550,000.

If this was all the priority agreement stated, the full \$6,550,000 would be subordinated under the priority agreement and Sea Con’s malpractice claim would fail because it could not prove damages. However, there is an additional paragraph in the priority agreement that addresses increased loan amounts.

The priority agreement’s final paragraph states in pertinent part:

The Mortgage Company shall have the right at any time within four (4) months after the completion of the said improvements to make or procure to be made a new mortgage loan in like sum, the proceeds thereof to be applied in satisfaction and discharge of said mortgage, or to increase the amount of the said loan in any amount, provided only the net balance of proceeds of such increased mortgage loan after payment of the usual commissions and expenses and after full payment and discharge of the said prior mortgage loan shall be applied by the Mortgage Company in

⁸ (Emphasis added).

payment or in partial payment of any bill for materials or labor incurred in the construction of the said improvements, and any such new mortgage shall have the same priority as the original mortgage herein referred to.

The parties offer competing ways of reading this poorly drafted paragraph. Sea Con would have the priority agreement condition the subordination of any additional loan amounts on Washington First's payment of Sea Con's outstanding invoices from those additional loans. Hanchett argues that the priority clause stands alone and is not conditioned on Sea Con receiving payments out of the increased mortgage loan amount.

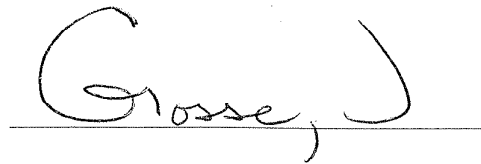
On its face, this paragraph is a provision allowing for the refinancing of the mortgage loan within four months after completion of the project, and prescribing what must be done with the net proceeds of any new mortgage loan or increased loan amount used to pay off the prior mortgage loan secured by the deed of trust. In other words, in the event a new mortgage loan or increased mortgage loan is used to pay off the original mortgage within four months after the project is completed, the net proceeds in Washington First's possession must be used to pay any outstanding construction bills; and any such new mortgage shall have the same priority as the original mortgage.

However, this provision is inapplicable to the case at bar because this is not a case where a new loan or increased loan was used to pay off the original mortgage within four months after the project's completion. Instead, the modification of the deed of trust increasing the loan amount was made in order

to complete the project. Because the priority agreement implicates the deed of trust securing the note in the principal amount of \$5,400,000 together with all modifications, the entire \$6,550,000 remains subordinated under the priority agreement.

To prove causation in a legal malpractice action Sea Con needs to show that “the outcome of the underlying litigation would have been more favorable, but for the attorney’s negligence.”⁹ Sea Con entered into the priority agreement prior to Hanchett’s involvement in the case. Because, as a matter of law, the terms of the priority agreement assign priority to Washington First for the full \$6,550,000 loan amount, Sea Con cannot show that any alleged act or omission of Hanchett caused Sea Con to lose priority over the increased loan amounts.¹⁰

We affirm the superior court’s summary judgment order.

A handwritten signature in cursive script, appearing to read "Grosse", is written over a horizontal line.

WE CONCUR:

⁹ Aubin v. Barton, 123 Wn. App. 592, 608, 98 P.3d 126 (2004).

¹⁰ See Fisk v. Newsum, 9 Wn. App. 650, 513 P.2d 1035 (1973)(plaintiff’s entering into a subordination agreement prior to his attorney’s involvement in the bankruptcy case negated plaintiff’s chance of collecting on his underlying claim, thus making it impossible for plaintiff to prove for purposes of his legal malpractice claim that his attorney’s actions damaged him).

Becker, J.

Baker, J.